(1)

No. 88-309

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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QUESTIONS PRESENTED

Under the implied-reservation-of-water doctrine, a Federal reserved water right was awarded by the Wyoming state courts for all practicably irrigable land within the present boundaries of the Wind River Indian Reservation. The Federal reserved water right was quantified in the approximate amount of 500,000 acre-feet per annum, for the irrigation of some 100,000 acres, and was awarded a priority as of 1868, the date of the treaty establishing the Reservation. Pursuant to congressional directive in 1905, however, water rights for the irrigation of 145,000 acres of Indian lands had been obtained under state law, overlapping more than 70% of the lands for which the Federal right was subsequently adjudicated.

The questions presented are:

1. Can a Federal reserved water right impliedly exist for the Reservation despite an express Congressional requirement that the Reservation's water rights be obtained under state law?

If so,

2. In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific tribe?

3. What priority date should be accorded a reserved water right, if any, for practicably irrigable lands which were ceded by the Reservation's Tribes, if those lands later were restored to and made a part of the reservation by the United States or were reacquired by Indians from non-Indians?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, State of Wyoming, and the respondents, United States of America, Shoshone Tribe of the Wind River Indian Reservation, Northern Arapaho Tribe of the Wind River Indian Reservation, Mary O. Ahlborn, Eva M. Barnett, Owen Barnett, Bradford-Bath, Donald Bath, Black Butte Livestock Company, Campbells, Inc., City of Riverton, Wyoming, Kenneth Ward Crandall, Phyllis L. Crandall, DHB & Co., Barbara J. Daniels, Billie M. Daniels, Deaver Irrigation District, Carl Dockery, Carol Dockery, Clyde R. Fisher, Gloria A. Fisher, Charles Goldben, Grace Graboski, Griffin Brothers, Incorporated, Olga J. Harvey, Robert W. Harvey, Albert Hornecker, Hornecker Livestock Co., Inc., Bertha Jones, Brenda Joyce Kellogg, Gary V. Kellogg, Irene M. Long, Russell E. Long, Elsie Martin, Richard Martin, William A. Matthews, Arthur D. McCumber, Marvin W. Meyer, Ernestine S. Meyer, Midvale Irrigation District, Carolyn R. Nelson, Vern Nelson, Norwest Bank of Omaha, N.A., Norris Edwin Odee, F. Louise Odee, William Okie, Kenneth Outland, Iona Outland, Owl Creek Irrigation District members, PLB & Co., Sylvia Paulsen, Red Creek Cattle Company, Red Lane Watershed Improvement District, Jerry D. Redding, Sheila C. Redding, Charles Richardson, Riverton Valley Irrigation District, C. Duane Rush, Kathryn C. Rush, Brian F. Sanford, Kathleen Sanford, Norman L. Sanford, Daisy E. Sessions, Newell S. Sessions, Barbara Smith, Robert Stewart, Town of East Thermopolis, Wyoming, Ralph Floyd Urbigkit, V E Bar Livestock Company, Barbara Webber, Landis Webber, Delores J. Weese, Raymond C. Weese, Willwood Irrigation District, Ruth Clare Yonkee.

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Pursuant to Rule 21.1(k), the material required by Rule 21.1(f), (h), and (k), being too voluminous to be conveniently included in or with the petition, is presented in separately bound Volumes I and II.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

The Petitioner, State of Wyoming, respectfully requests that a writ of certiorari issue to review the judgment of the Wyoming Supreme Court entered on February 24, 1988.

OPINIONS BELOW

The February 24, 1988, opinion of the Wyoming Supreme Court, 753 P.2d 76 (Wyo. 1988), is reprinted in the separately bound Appendix A hereto, at p. 1a. That court's order denying petitions for rehearing is reprinted in Appendix B, p. 120a. The amended judgment and decree of the state district court, May 24, 1985, is reprinted in Appendix D, at p. 168a; as are the district court's Order of May 24, 1985, ruling on its master's supplemental and final report, Appendix C, at p. 121a, the district court's judgment of May 10, 1983, ruling on its master's initial report, Appendix F, at p. 202a, and the district court's order of June 8, 1984, ruling on various post-judgment motions, Appendix E, at p. 185a. The supplemental and final report of the district court's master, dated June 1, 1984, is reprinted in the Appendix hereto, Appendix G, at p. 280a, as is the master's initial report of December 15, 1982, Appendix H, at p. 367a. The Federal district court's order, remanding the matter back to state court and its findings of fact and conclusions of law therein, dated May 31, 1977, have not been reported and are reprinted in Appendix I hereto, at p. 718a.

JURISDICTION

The decision of the Wyoming Supreme Court was rendered on February 24, 1988, affirming in part and reversing in part the amended judgment and decree of the state district court, and remanding the matter for further proceedings consistent with the opinion. The Wyoming Supreme Court denied timely petitions for rehearing on April 22, 1988. This Court's Order Extending Time to File Petition for Writ of Certiorari to August

20, 1988, was entered in A-14 on July 7, 1988. The jurisdiction of this Court to review the judgment of the Wyoming Supreme Court is invoked under 28 U.S.C. § 1257(3). The finality of the Wyoming Supreme Court's judgment is described in the Statement of the Case, at note 7, *infra*, and the accompanying text.

TREATY, STATUTES AND ORDERS INVOLVED

The provisions of the treaty, statutes and regulations which this case involves are set forth in the separately presented Appendix, at the page indicated following the citations below:

Second Treaty of Fort Bridger, 15 Stat. 673 (1868), Appendix AA, p. 793a.

Wyoming Constitution, Article VIII, § 1, 3 (1890), Appendix Z, p. 792a.

Wyoming Admission Act, 26 Stat. 222 (1890), Appendix Y, p. 782a.

The Act of March 3, 1905, 33 Stat. 1016 (1905), Appendix X, p. 769a.

Act of June 18, 1934, Ch. 576, 48 Stat. 984 (1934), Appendix W, p. 753a.

Act of July 27, 1939, 53 Stat. 1128 (1939), Appendix BB, p. 804a.

First permanent restoration order, 5 Fed. Reg. 1805 (1940) Appendix V, p. 751a.

Second permanent restoration order, 7 Fed. Reg. 7458 (1942); Correction to Regulation, 7 Fed. Reg. 9439 (1942), Appendix U, p. 748a.

Third permanent restoration order, 7 Fed. Reg. 11100 (1942) Appendix T, p. 746a.

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Fifth permanent restoration order, 9 Fed. Reg. 9749 (1944); Order Amending Order of Restoration, 10 Fed. Reg. 2812 (1945), Appendix R, p. 741a.

Sixth permanent restoration order, 10 Fed. Reg. 2254 (1945), Appendix Q, p. 739a.

Seventh permanent restoration order, 10 Fed. Reg. 7542 (1945), Appendix P, p. 737a.

Eighth permanent restoration order, 13 Fed. Reg. 8818 (1948), Appendix O, p. 735a.

Act of August 15, 1953, Pub. L. No. 284, 67 Stat. 592, Appendix N, p. 731a.

Tenth permanent restoration order, 39 Fed. Reg. 27561 (1974), Appendix L, p. 729a.

STATEMENT OF THE CASE

This general adjudication of all water rights in Wyoming's Big Horn River basin, comprising over thirteen million acres (twenty-one thousand square miles), began in January, 1977, with the filing of the petitioner's complaint and service of process on over twenty thousand water users, pursuant to Wyo. Stat. § 1-1054.1 (1957) (now Wyo. Stat. § 1-37-106 (1977)), Appendix K, p. 726a., and the McCarran Amendment, 43 U.S.C. 666. The United States, claiming water rights in both its proprietary capacity and as trustee for the Shoshone and Arapaho Tribes of the Wind River Indian Reservation, removed the adjudication to the United States District Court which remanded the adjudication to state court. Appendix I, p. 718a. The state district court denied motions to dismiss by the Tribes and the United States, allowed the Tribes to intervene, and appointed a special master. The master divided the adjudication into three phases: (1) federal water right claims by and on behalf of the Indian Tribes, which are now before this Court, (2) federal water right claims of the United States in its proprietary capacity (e.g., Yellowstone National Park and two national forests) which were resolved by negotiation and were the subject of final judgment from which no appellate review was sought, and (3) approximately 27,000 claims by all parties based solely on state law, which are still before the state district court's master. Appendix D, p. 168a.

The Wind River Indian Reservation

Originally part of the public domain created by the Louisiana Purchase, the Wind River Indian Reservation was selected by the Shoshone pursuant to what is known as the Second Treaty of Fort Bridger of 1868, 15 Stat. 673. Appendix AA, p. 793a. Subsequently, the Arapaho were settled on the Reservation. *See Shoshone Tribe v. United States*, 299 U.S. 476 (1937). Through a period ending in 1905, the Reservation was three times reduced in size by agreement with the Tribes. The last and most substantial reduction (1,480,000 acres) was effected by the Second McLaughlin Agreement of 1904, ratified by the Act of March 3, 1905, 33 Stat. 1016, hereinafter "1905 Act." Appendix X, at 776a, *et seq.* Under an active allotment program, some 2,500 allotments, comprising over 240,000 acres, passed into individual Indian ownership. Wyo. Ex. WRIR PW-2, p. 260.

The 1904 Agreement ceded to the United States all lands north of the Big Wind and east of the Popo Agie and the Little Wind. For roughly 35 years the remaining or "diminished" Reservation's exterior boundaries remained stable. Outside of those boundaries, however, the ceded lands were returned to public domain status,[1] 88,000 acres were entered and settled by non-Indians by 1918, and 336,000 acres were withdrawn for a major reclamation project, to be disposed of by homestead entry,

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[1] The Reservation's Indians agreed to "cede, grant and relinquish" the lands to the United States. Act of March 3, 1905, 33 Stat. 1016, Appendix D, p. 769a. Following approval of the cession, on June 2, 1906, President Roosevelt proclaimed the ceded lands opened to public entry under the "homestead, townsite, coal and mineral land laws." Wyo. Ex. WR-33.3D. 34 Stat. 3208 (1906). Congress thereafter referred to the ceded lands as "lands formerly embraced" by the Reservation, Ch. 151, 34 Stat. 849 (January 7, 1907). Simultaneously, the ceded lands were uniformly excluded from the Reservation as it was portrayed on maps prepared by the United States Department of Interior in 1907, 1912 and 1923, State's Ex. 32-10, 12 and 15. *C.f. Merrill v. Bishop*, 287 P.2d 620, 625 (Wyo. 1955); *McKinney v. Big Horn Basin Development Co.*, 167 F. 770, 775 (D. Wyo. 1909).

Act of March 4, 1921, Ch. 161, 41 Stat. 1367, at 1404. The Reservation's diminished and ceded portions, as well as the reclamation withdrawal, are shown on the map attached hereto as Exhibit A.

Reservation Water Development Pursuant to State Law

Under what was known as the "Water Proviso" of the 1905 Act's Article III, Appendix X, at pp. 778-79a, a part of the proceeds from the sale of ceded lands were designated to obtain water rights for the Indians under Wyoming law. *See* note 12, *infra*. This amount, together with supplemental federal appropriations of $2,264,100, was used to fund the acquisition of water permits and the development of canals, reservoirs and cultivated lands to perfect the permitted rights. Wyo. Ex. WRIR I&P Ex. 225, 234, 235, 14 and Ex. PW-2. By 1915, state water rights had been acquired on behalf of the Indians for the irrigation of approximately 145,000 acres of Reservation lands, including over 70% of the lands for which Federal reserved water rights were eventually awarded, *see* note 4, *infra*, and major federal irrigation projects had been constructed for the benefit of Indian lands. During the same period, 3,500-4,000 non-Indians entered the lands ceded by the 1904 agreement and applied for state permits to irrigate approximately 400,000 acres. Wyo. Exs. PW-2, at p. 234, SR-5. Development of Indian irrigation projects on the Reservation was characterized by extensive cooperation between the Indian Service and the Wyoming State Engineer. From 1905 to 1963, as delays in completing project construction on portions of the diminished Reservation prevented timely application of water to beneficial use upon many Indian tracts, extensions were routinely granted by the State Engineer. Furthermore, during this period, water was applied to beneficial use on many Indian tracts (both fee allotted and trust lands) and certificates of appropriation were issued by the State Board of Control confirming water rights, generally with a 1905 priority date. Wyo. Ex. SR-8.

As would be expected, however, announcement of *Winters v. United States*, 207 U.S. 564 (1908), and the opinions which it affirmed, caused some Indian advocates to seek application of the *Winters*' implied-reservation-of-water doctrine to the Wind River Indian Reservation. Consistent with its 1905 decision to require the Tribes to define and perfect their water rights under the doctrine of prior appropriation, pursuant to Wyoming law, Congress rebuffed several attempts to change the law, including attempts to create an express reserved water right for the Reservation. *See* note 11, *infra*. The steady progress of the Indian Service in its work to build irrigation systems within the Reservation doubtless lent support to arguments of Congressmen that the system put in place by the 1905 Act was working satisfactorily. In 1963, however, following announcement of *Arizona v. California*, 373 U.S. 546 (1963), the Indian Service (now the BIA) no longer requested extension of deadlines by the State Engineer. Consequently, unperfected state-awarded water right permits expired for 58,000 acres, leaving perfected state-awarded water rights in place for 87,000 acres. Wyo. Ex. WRIR, SR-8. Although no extensions for Indian project permits have been requested or granted since 1963, those permits may be reinstated upon application to the Wyoming State Engineer.

Restoration and Reacquisition of Ceded Lands

Following cession in 1905, several hundred thousand acres of ceded land were acquired by non-Indians. Wyo. Ex. PW-2, p. 246. In 1934, however, Congress authorized the "restoration to tribal ownership" of Reservation lands such as those ceded in 1905. Act of June 18, 1934, Ch. 576, Sec. 3, 48 Stat. 984 (1934), Appendix W, p. 753a. Shortly thereafter, the unclaimed public lands within the area ceded by the 1904 agreement which had not yet passed into private ownership were temporarily withdrawn from further entry. U.S. Exh. WR-20. The Act of July 27, 1939, Ch. 386, 53 Stat. 1128 (1939), authorized the Secretary of Interior to acquire ceded lands in non-Indian ownership and to restore undisposed

of ceded lands. Appendix BB, p. 804a. From time to time thereafter, beginning in 1940 and ending in 1974, large tracts of vacant ceded lands, needed by the Tribes for grazing purposes, were permanently "restored to" and "made a part of" the Reservation by the United States.[2] During roughly the same period, numerous non-Indian in-holdings within the ceded area were purchased or "reacquired" by or for the Tribes.[3] Nevertheless, at present approximately 42,000 acres of lands originally allotted to individual Indians have been conveyed to non-Indian grantees within the Reservation. Wyo. Ex. PW-2. In addition, several thousand other non-Indians live either on ceded lands patented under the public land laws after 1905 or on lands in the large Riverton Reclamation Withdrawal located on ceded lands, within the current boundaries of the Reservation.

Adjudication of the Reservation's Reserved Water Right

The United States claimed federal water rights on behalf of the Reservation's Tribes under the implied-reservation-of-water doctrine. The Tribes subsequently

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[2] These restoration orders by the Secretary of the Interior generally recited that the ceded land was "urgently required as grazing land for the use of the Shoshone-Arapaho Tribes of Indians in order to properly support and develop their rapidly expanding cattle industry" and directed that the "undisposed-of" ceded lands be "restored to tribal ownership for the use and benefit of the Shoshone-Arapaho Tribes of Indians of the Wind River Reservation, Wyoming, and are *added to and made a part of* the existing Wind River Reservation." (emphasis added) *See* 5 Fed. Reg. 1805 (1940), Appendix V, p. 751a; 7 Fed. Reg. 7458 (1942), Appendix U, p. 748a; 7 Fed. Reg. 11100 (1942), Appendix T, p. 746a; 8 Fed. Reg. 6857 (1943), Appendix S, p. 744a; 9 Fed. Reg. 9749 (1944), Appendix R, p. 741a; 10 Fed. Reg. 2254 (1945), Appendix Q, p. 739; 10 Fed. Reg. 7542 (1945), Appendix P, p. 737a; 13 Fed. Reg. 8818 (1948), Appendix O, p. 735a; 39 Fed. Reg. 27561 (1974), Appendix L, p. 729a, *c.f.* Act of Aug. 15, 1953, Pub. L. No. 284, 67 Stat. 592, Appendix N, p. 731a.

[3] These reacquisitions were made by the United States with the proceeds of the Shoshone Judgment Fund, *see* Ch. 387, 53 Stat. 1128, July 27, 1939, Appendix BB, p. 804a, and *U.S. v. Shoshone*, 304 U.S. 111 (1938) and by individual Indian families.

concluded that the United States' reserved water right claims were inadequate and filed their own supplemental claims both before and during trial. In addition, non-Indian grantees who held lands originally allotted to individual Indians subsequently claimed reserved water rights.

Claims By and on Behalf of the Tribes

After trial, the master recommended a decree granting an 1868 reserved water right in the amount of 477,300 acre-feet per annum, quantified based on practicably irrigable lands within both the diminished and ceded portions of the Reservation.[4] In addition, the master recommended the award of a reserved water right for a variety of non-agricultural purposes. Appendix H, at p. 696a, *et seq.* The district court rejected the master's recommendations for non-agricultural reserved rights but awarded (1) an 1868 reserved water right of 350,000 acre-feet for 37,300 acres of historically irrigated lands, Appendix D, at pp. 169-72a, paragraph 1, and 48,100 acres identified for inclusion in future projects, *id.*, at p. 172a, paragraph 2, and (2) a reserved water right of 84,800 acre-feet with varying priority dates, based on practicably irrigable reacquired lands, of which 16,900 had been historically irrigated and 400 were to be included in future projects. *Id.*, at p. 168a, paragraph 3, and p. 182a. The district court concluded that the priority date for the reserved water right for reacquired lands would be the earlier of: (1) the date on which the land was first sold to a non-Indian, (2) the date on which water was first put to beneficial use (without regard to quantity of acres irrigated), or (3) the date of any applicable state permit. *Id.*, at p. 173a.

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[4] Including 54,200 acres of historically irrigated lands, also covered by state water rights, and 48,520 acres which had never been irrigated but which were included within future Indian irrigation projects. Appendix H, pp. 671-72a, findings of fact 95 and 96, pp. 681-82a, finding of fact 60. Over 20,000 acres of lands within the future projects were the subject of state water right permits. Wyo. Ex. WRIR SR-3 (Rev.).

Claims by Allottees' Grantees

A number of non-Indians claimed that they succeeded to an 1868 Indian reserved water right when they or their predecessors acquired allotments of land originally granted to individual Indians. These claims by allottees' grantees were opposed by the State, the United States, and the Tribes. The Master recommended that the claims be denied, Appendices H, at p. 640a, paragraph 16, and G, at p. 326a, paragraph 3, and the district court accepted and incorporated that recommendation in its final judgment. Appendices F, at pp. 224-25a, C, at p. 129a, paragraph A.

Action by the Wyoming Supreme Court

A closely divided Wyoming Supreme Court (3-2) affirmed the judgment of the district court, except for (1) an increase of 21,000 acre-feet in the amount of the 1868 reserved water right based on the future projects, reversing a 10% reduction recommended by the Master and adopted by the district court and increasing the total award to 500,420 acre feet, (2) the reversal of the lesser priority date for the reserved water rights quantified for reacquired lands, and (3) the reversal and remand for further hearing of the district court's denial of reserved rights claimed by allottees' grantees who were not Indians. Appendix A, at pp. 56-58a, 75a, and 72-75a, respectively. The judgment of the Wyoming Supreme Court awarded an 1868 Indian reserved water right based on 40,300 practicably irrigable acres of unsold ceded lands which had been restored and added to the Reservation during the period of 1940-1974 [5] and based on 19,500 acres of practicably irrigable lands which had been reacquired from non-Indian ownership during approximately the same period.[6] The judgment of the Wyoming

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[5] 38,000 acres in future projects and 2,300 acres of historically irrigated lands.

[6] 12,400 acres of trust lands historically irrigated, 2,600 acres of trust lands designated for future projects, and 4,500 acres of historically irrigated Indian fee lands.

Supreme Court is final on its face, except for the remand to the district court with instructions to award an 1868 reserved water right to the allottees' grantees for practicably irrigable land which ". . . they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter." Appendix A, at p. 75a. Under this Court's decisions, this remand for such a factual determination does not deprive the decision below of finality.[7]

Positions of the Parties Below

In general, the United States and Tribes asserted an 1868 priority for a reserved water right based on the amount of water needed to irrigate all practicably irrigable acreage within the Reservation and for other broadly defined purposes.[8] The State and most other

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[7] Under this Court's holding in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), such a remand does not disturb the finality of the Wyoming Supreme Court's judgment. The question which the Wyoming Supreme Court remanded, the amount of land now owned by non-Indians which was originally irrigated by Indians or by non-Indians within a reasonable time after their acquisition, is a question of fact. Therefore, this matter falls within the exceptions outlined in *Cox, supra*, 420 U.S. at 480, 482-83, which justify this Court's taking jurisdiction before absolute finality below. The Wyoming Supreme Court's decision on the Federal issue is conclusive and "will survive and require decision regardless of the outcome of future state-court proceedings," and since reversal by this Court on Question 1, herein, would preclude further litigation on the remanded issue. Acceptance of jurisdiction of this case in its present posture would be entirely consistent with the avoidance of piecemeal review, the avoidance of advisory opinions, and minimization of federal intrusion into state affairs. *North Dakota State Board of Pharmacy v. Snyders Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

[8] Initially, however, the United States claimed a more recent priority date for a reserved water right quantified to serve practicably irrigable acreage located on reacquired lands. Reply of the United States to Wyoming's Response to the Claims for Water Rights of the United States, September 4, 1980, p. 15: "All of the reserved water rights for the Wind River Indian Reservation have a priority date of 1868 *except* for those which are *for use of lands*

parties opposed all aspects of the reserved water right claims.[9] The United States, the Tribes, the State and most private parties opposed the claims of the remaining private parties that, as successors to Indian land owners, they also succeeded to a reserved water right. Appendices H, at p. 406a (¶ 12), G, at p. 283a.

REASONS FOR GRANTING THE WRIT

The Wyoming Supreme Court's judgment below decided several important federal questions in a way which conflicts with two decisions of this Court, with the principles announced in eight decisions of this Court, and with five decisions of the federal appeals courts. In addition, the Wyoming Supreme Court has decided important questions of federal law which have not been, but should be, settled by this Court. Those federal questions are important to the determination of water rights for forty-seven Indian reservations now being undertaken in nine western states, in which thirty-two general adjudications are now underway, involving a total of

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sold to non-Indians and later repurchased." (Emphasis added) Appendix F, at p. 224a.

[9] As recognized in the master's report, Appendix H, following the filing of claims by the United States and Tribes, the State and private parties asserted: (1) that no reserved water rights existed for this particular reservation, based on Congressional intent to obtain the Reservation's water rights under state law rather than by reservation (Question 1, herein), Appendix H, at pp. 404a, ¶ 2, 405a, ¶ 1, 431a, *et seq.*, *see also* State of Wyoming's Response to United States' and Tribes' Statements of Claim, July 16, 1980, p. 10, ¶¶ 5-6, hereinafter "State's Response;" (2) that any reserved water should be quantified based on the amount of water which was necessary to ensure that the Reservation's primary agricultural purpose was not entirely defeated in order to meet the Reservation's minimum needs and to provide a moderate standard of living for the Indians (Question 2, herein), Appendix H, at pp. 406a, ¶¶ 9-11, p. 411a, *et seq.*; *see also* State's Response, p. 11, ¶ 11, pp. 12-13, p. 23, ¶ 10; and (3) that any reserved right quantified based on practicably irrigable acres located on restored or reacquired lands should bear a priority as of the respective dates of restoration or reacquisition (Question 3, herein), Appendix H, at pp. 403-06a, ¶ 7, *see also* State's Response, p. 7, ¶ 7, pp. 20-22.

650,000 water right claims by 265,600 parties. Although only four adjudications of Indian reserved water rights have been resolved by negotiation and are awaiting Congressional ratification, the parties in other ongoing adjudications are actively attempting to compromise their differences. Guidance from this Court with respect to the important federal questions presented here will provide far greater certainty with respect to the reserved water right for Indian reservations and enhance judicial economy by expediting litigation and by facilitating successful negotiation.

I. EXISTENCE OF A RESERVED WATER RIGHT—When Congress expressly requires the acquisition of a reservation's water rights under state law, the judicial creation of an implied Federal reserved water right for the reservation is contrary to the intent of Congress and is in conflict with the principles announced by this Court.

In the water proviso of the 1905 Act, Congress expressly required that water rights for the Wind River Indian Reservation [10] be obtained "as required by the statutes of the State of Wyoming in securing water rights from said state." [11] Two unsuccessful attempts

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[10] A similar approach was taken for three other Indian reservations in the western United States. Congress has provided that water rights on the following Indian reservations, in addition to the Wind River Reservation, be obtained under applicable state law: Uintah, Uncompaghre and White River Ute, Utah, Act of June 21, 1906, 34 Stat. 325, 375, *see also* Act of March 3, 1909, 35 Stat. 812; Blackfeet, Montana; Act of March 1, 1907, 34 Stat. 1035; Fort Peck, Montana, Act of May 30, 1908, 35 Stat. 558, 560.

[11] The minutes of the negotiations leading to the 1904 Agreement, ratified by the 1905 Act, indicate that the Indians' spokesmen were concerned that as much money as possible from the proceeds of the cession be taken to "secure our water rights and make them good to us." Minutes of Council, Shoshone Agency, Wyoming, April 19, 1904, at 19, Wyo. Exh. WRIR I&P 8. In response, the United States' negotiator stated to the Indians that the water rights proviso and the money for funding the acquisition of water rights was to "secure the Indians' water rights so that

were made expressly to create Federal reserved water rights for the Reservation, one as part of the 1905 Act and one in 1914 since, according to the Commissioner of Indian Affairs, the water proviso had "practically nullified" Federal reserved water rights under *Winters, supra.*[12] The water proviso is fully consistent with other

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the white man cannot deprive you of water with which to irrigate your lands." Consequently, in the Water Proviso of the 1905 Act's Article III, Appendix X, at pp. 778-79a, Congress determined:

> [These funds] shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts *as are required by the statutes of the State of Wyoming in securing water rights from said State* for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve. (emphasis supplied)

[12] Congress ratified the 1904 Agreement with the water proviso as described in note 11, above, in spite of the fact that the Indian Rights Association lobbied for the creation of an express limited reserved right. Wyo. Exh. WRIR I&P 6. To assure that water would be available to the Shoshone and Arapahoe allottees as against settlers coming to the opened lands, the Association, through the Secretary of the Interior, proposed a revised Article III to the 1904 Agreement which would have reserved waters on the Reservation from appropriation under Wyoming law until allotments were made on the diminished reservation. *See* United States House of Representatives, Report of the Committee on Indian Affairs, 58th Cong., 3rd Sess., January 19, 1905 at 7-9. The lobbying attempt failed due to the Senate Committee on Indian Affairs' concern that the proposed amendment would slow development of the ceded lands. United States Senate, Report of the Committee on Indian Affairs, 58th Cong., 3rd Sess., February 21, 1905, at 2; Wyo. Exh. WRIR I&P 7.

Later, in 1914, Congress passed an Indian Appropriation Act which provided, *inter alia*, for the appropriation of $25,000 to maintain, operate and complete canals within the Wind River Indian Reservation. 38 Stat. 582, 608, at sec. 24, Wyo. Exh. WRIR I&P 14. As the Act passed through Congress, however, there was an unsuccessful attempt to create an *express* reserved water right on behalf of the Wind River Reservation, and certain others. *See* United States Senate, Hearings before the Committee on Indian Affairs, March 12, 1914, at 279, Wyo. Exh. WRIR I&P 16. The reserved right proposed encompassed "the use of so much water as

pertinent federal legislation [13] and with Wyoming's admission to the Union.[14] Contrary to principles announced

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may be necessary to supply for domestic, stockwatering and irrigation purposes, land allotted or to be allotted to Indians on the *Wind River Reservation* or set aside for administrative purposes within said reservation." (emphasis added) *Id.*

The Office of Indian Affairs argued to Congress that, without the express reservation, Congress' appropriations would be put at substantial risk, for water rights on the reservations concerned, including Wind River, would be unprotected. United States House of Representatives, Hearings before a Subcommittee of the Committee on Indian Affairs, December 10, 1913, at 377-378, 707, Wyo. Exh. WRIR I&P 15; United States Senate, Hearings before Committee on Indian Affairs, March 12, 1914, at 280-281, Wyo. Exh. WRIR I&P 16. Commissioner Merritt reported to Congress that "*the very favorable decision of the Supreme Court in the Winters case regarding the water rights of Indians has been practically nullified by various acts of Congress, and as a result of such legislation, the water rights of Indians are now dependent on beneficial use in a number of reservations* where the Government has been, and is now, spending large amounts of reimburseable funds, *and by acts of Congress these water rights are subject to the laws of the several States wherein these irrigation projects are located.*" (emphasis added) United States House of Representatives, Hearings before a Subcommittee of the Committee on Indian Affairs, December 10, 1913, at 378, Wyo. Exh. WRIR I&P 15; United States Senate, *Id.* In spite of Commissioner Merritts' vigorous advocacy, the proposal to create an express reserved right failed.

[13] The water proviso of the 1905 Act is only one of many Congressional enactments relating to securing water rights for Indian reservations. As demonstrated by the water proviso and the legislation cited at note 10, above, Congress often elected to rely upon state law. *See also* note 12, above. Congress was not unaware, however, of its ability to reserve water expressly for reservation use, as other contemporaneous legislation reveals. *See* Act of March 6, 1906, 34 Stat. 53 (Yakima Reservation, Washington); Act of April 27, 1904, 33 Stat. 352 (Crow Reservation, Montana); Act of June 6, 1900, 31 Stat. 672 (Fort Hall Reservation, Idaho); Mission Indian Relief Act of 1891, 26 Stat. 712 (Mission Indians, California). Congress' election to provide for the acquisition of water rights on the Wind River Reservation under Wyoming law was part of a conscious pattern of Congressional action.

[14] This Court has ruled that Wyoming's admission to the Union impliedly terminated off-reservation hunting rights of the Wind

by this Court, the Wyoming Supreme Court has elected (1) to reject this express congressional requirement, (2) to hold that a reserved water right exists, by implication, for the Wind River Indian Reservation, and (3) to cancel, as contrary to that implied right, all existing State of Wyoming water right permits for the Reservation obtained under the direction of the water proviso. Appendix A, at pp. 25a-31a, 75a.

The decision of the Wyoming Supreme Court is in direct conflict with the principles announced in controlling decisions of this Court. When it expressly addresses the question of whether federal entities must abide by state water law, Congress almost invariably defers to state law. *United States v. New Mexico*, 438 U.S. 696, 701-702 (1978); *California v. United States*, 438 U.S. 645 (1978). A reviewing court may conclude that Congress intended to reserve water by implication only if "the purposes of the reservation would be entirely defeated" without the implication. *United States v. New Mexico*, 438 U.S. at 700. *See Arizona v. California*, 373 U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908). Nevertheless, the Wyoming Supreme Court failed to honor this Court's explicit delineation of those circumstances giving rise to an implied reserved water right.[15] There was no effort below to determine whether,

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River Tribes expressly created by the 1868 Fort Bridger Treaty. *Ward v. Race Horse*, 163 U.S. 504 (1896). Congress' admission of Wyoming to the Union, somewhat uniquely, approved the Wyoming Constitution which declared state ownership of all waters within Wyoming and exclusively applied the appropriation doctrine in the state. Act of July 10, 1890, 26 Stat. 222. Wyo. Const. Art. VIII §§ 1 and 3, Appendix Z, p. 792a. While Wyoming's admission, of itself, may be insufficient to demonstrate the absence of an implied reserved water right for the Reservation, it is entirely consistent with Congress' enactment of the water proviso.

[15] The Master, whose decision on this point was accepted by the District Court, went so far as to hold that the "*Winters* decision rendered [the 1905 Act's water proviso] of no legal force or affect [sic] regarding securing state water rights." Appendix H, p. 638a, ¶ 8.

by the water proviso and the resultant acquisition of state water rights, Congress had intended to fulfill—and had succeeded in fulfilling—the agricultural purpose of the Wind River Indian Reservation. As is apparent from the decision of the Wyoming Supreme Court, Appendix A, pp. 25a-31a, and from the Report of the Master, Appendix H, at p. 642a, paragraph 19, Wyoming was assigned the burden of proving that a reserved water right for the Reservation did *not* exist. No evidence was presented by the United States or the Shoshone and Arapaho Tribes that, absent the implication of the vast reserved water right decreed below, reliance upon the Reservation's substantial state water rights alone would prevent its agricultural purpose from being "entirely defeated." [16] Indeed, after eighty years of full agricultural development, the water requirements of the Reservation were only slightly more than one-half of the reserved water right awarded below.

The decision of the Wyoming Supreme Court is also in conflict with this Court's decisions regarding the termination of Indian treaty rights. If the United States impliedly intended to create a reserved water right on behalf of the Wind River Indian Reservation in 1868, it

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[16] The decision of the Wyoming Supreme Court is also inconsistent with the decisions of the Ninth Circuit Court of Appeals which, most recently relying upon this Court's decision in *New Mexico*, have consistently called for a determination that water is necessary to fulfill the essential purposes of a reservation before implying the existence of a reserved water right. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-47 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981); *United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983), *cert. denied, Oregon v. United States*, 467 U.S. 1252 (1984); *United States v. Walker River Irrigation District*, 104 F.2d 334, 336-340 (9th Cir. 1939). While these decisions have declared the existence of an implied reserved water right, none of the Courts was faced with a Congressional enactment applying state law on the reservation at issue. The Wyoming Supreme Court's decision differs from these, however, by the absence of a careful examination of the necessity of the implied right to prevent reservation purposes from being entirely defeated, as demanded by *New Mexico*.

was terminated by the express language of the water proviso in 1905. The Wyoming Supreme Court's discussion of this issue is so sparce as to make it impossible to determine the standards which that court may have applied. Those standards were elaborated by this Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) ("*Rosebud*") which indicates that termination of Indian treaty rights by subsequent legislation may be found on the face of the legislation, in its legislative history, or in the circumstances surrounding its enactment. Most recently, in *United States v. Dion*, 476 U.S. 734 (1986), this Court stated that the legislative history of congressional action will be most persuasive if the intent to terminate Indian rights can clearly and reliably be found in the legislative history of a statute. In its holding on the termination issue, Appendix A, at pp. 31a-32a, the Wyoming Supreme Court failed even to address the fact that Congress carefully considered and refused to enact a limited reserved water right for the Wind River Indian Reservation.[17] *See* note 12, *supra*.

The lower court simply failed to assign any meaning or purpose to the water proviso or to the thorough and successful state water right acquisition program conducted under it. The Wyoming Supreme Court held that the water proviso and its legislative history were "no indication" of Congress' intent with respect to the existence of reserved water rights on the Reservation, without so much as alluding to what conceivable contrary

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[17] The Wyoming Supreme Court made no analysis of the continued necessity of the implied reserved water right in the face of the express 1905 legislation providing for the acquisition of Wyoming water rights for the Reservation. This Court's decisions, making it clear that *need* is the fulcrum upon which the implication of a reserved water right is balanced, lead to the conclusion that when the needs of a reservation are met by express federal reliance upon state law, deference to state law should supersede the continued existence of any previously created implied reserved water right. *United States v. New Mexico*, *supra*, at 701-702.

purpose Congress might have had. Appendix A, p. 29a. This Court has instructed, in construing an Indian termination act, that a federal statutory proviso should not be interpreted to give it a meaning that will amount to its rejection. *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 508 (1913).

This Court should accept certiorari to correct the lower court's failure to adhere to this Court's decisions, to resolve this significant question of first impression affecting the Wind River and three other reservations, and to assign a meaning and purpose to a federal statute which the Wyoming courts have elected to write into oblivion.

II. QUANTIFICATION OF THE RESERVED WATER RIGHT—The Wyoming Supreme Court's quantification of a Federal reserved water right, in the absence of any demonstrated necessity for the water, is in conflict with the principles announced by this Court and the decisions of the Ninth Circuit.

The appropriate quantification standard for reserved water rights of an agricultural Indian reservation is an important question of federal law which has not been, but should be, settled by this Court. The Wyoming court's award of a reserved water right is based solely on an amount of practicably irrigable acreage which is far in excess of the Wind River Reservation's abundant historically irrigated acreage. In addition, the award was made without evidence that additional water was necessary to prevent the defeat of the Reservation's agricultural purpose. In these two respects, the Wyoming Supreme Court's decision is in conflict with the principles announced by this Court and in conflict with the decisions of the Ninth Circuit federal court of appeals.

A. *The appropriate standard of quantification for the reserved water rights of agricultural Indian reservations is an important question of federal law which has not been, but should be, settled by this Court.*

When it first addressed this question, this Court concluded that the reserved water right for certain agricultural Indian reservations included "enough water . . . to irrigate all the practicably irrigable acreage" on the reservation. *Arizona v. California*, 373 U.S. 546, 600-601 (1963), hereinafter *Arizona I*. Those reservations, however, had been set aside for the future requirements of unknown tribes. *Report, Simon H. Rifkind, Special Master*, December 5, 1960, pp. 262-63. The Court rejected Arizona's contention that the amount of the reserved water right should be measured by the Indians' "reasonably foreseeable needs." During the next fifteen years, however, the Court began to view quantification quite differently. By 1978, the Court concluded that the reserved right included only enough water to ensure that the primary purpose of the reservation was not "entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700 (1978), hereinafter *New Mexico*, *c.f. Cappaert v. United States*, 426 U.S. 128, 141 (1976), hereinafter *Cappaert*, (approving only an amount necessary for the reservation's "minimal need"). Those subsequent cases, to be sure, dealt with reservations other than Indian reservations. Nevertheless, in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), hereinafter *Fishing Vessel*, the Court firmly stated that the principle in quantifying Indian rights to natural resources is to provide the Indians with a moderate standard of living.[18] Finally, the *Ari-*

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[18] "As in *Arizona v. California* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Fishing Vessel, supra*, 443 U.S. at 686.

zona I dispute was again addressed by this Court in *Arizona v. California*, 460 U.S. 605 (1983), hereinafter *Arizona II*, in which the United States and Tribes sought an increase in their reserved water right. The States, on the other hand, suggested that the Court should reconsider the "practicably irrigable acreage" standard. To preserve the certainty of its previous decree *in that case*, this Court refused to reopen the quantification issue.[19]

The inevitable resulting question left for the lower courts, of course, is whether "practicably irrigable acreage" is simply *res judicata* as to the reservations in *Arizona I* and *II* or whether it is the sole quantification standard for *all* agricultural Indian reservations, including those which were set aside for a specific tribe. For example, at the urging of the United States, the Claims Court recently hedged its bets in concluding that "practicably irrigable acreage" *is* the standard, *but* that the standard is now subject to a "restrictive interpretation" based on concepts of necessity. *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 626 (1987).[20] The Wyoming Supreme Court, on the other

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[19] "We also fear that the urge to relitigate, once loosed, will not be easily cabined. The States have already indicated, if the issue were reopened, that the irrigable-acreage standard itself should be reconsidered in light of our decisions in [*New Mexico, supra, Fishing Vessel, supra*], and we are not persuaded that a defensible line can be drawn between the reasons for reopening this litigation advanced by the Tribes and the United States on the one hand and the States on the other. It would be counter to the interests of all parties to this case to open what may become a Pandora's Box, upsetting the certainty of all aspects of the decree. These considerations, combined with the practice in our original cases and the strong res judicata interests involved, lead us to conclude that the irrigable-acreage question should not be relitigated." *Arizona II, supra*, 460 U.S. at 625-626.

[20] "The term 'practicably irrigable acreage' is now recognized as the quantification of a tribe's Winters Doctrine rights. However, more recent Supreme Court decisions manifest a restrictive interpretation of that measure. [*Cappaert, supra*], stated that *Winters* had held that a reservation of water rights sufficient to accomplish

hand, analyzed this Court's decisions, failed to find any such "restrictive interpretations," and concluded that *Arizona II* conclusively reaffirmed the original "practicably irrigable acreage" standard announced in *Arizona I*, without regard to any concepts of necessity.[21]

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the purpose of the reservation is made when the Government reserves land for a reservation or other federal enclave. *Cappaert* went on to state boldly: 'The implied-reservation-of-water rights doctrine, . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.' 426 U.S. at 141, 96 S.Ct. at 2070 (citing [*Arizona I, supra*]). The law is now settled that "Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more.'" [*New Mexico, supra*, 438 U.S. 696, 700] (quoting *Cappaert* and *Arizona v. California*). The Supreme Court in [*New Mexico, supra*] ventured a step further:

> Each time this court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purpose of the reservation would be *entirely defeated.*

"438 U.S. at 700, 98 S.Ct. at 3014 (emphasis added).

"In the later case of [*Arizona II, supra*], the extent of the reservation of water rights was described as 'an allotment of water necessary to' make the reservation liveable." 460 U.S. at 616, 103 S.Ct. at 1389 [quoting *Arizona I, supra*, 373 U.S. at 599-600]." *White Mountain, supra*, 11 Cl. Ct. 626.

[21] Appendix A, at 47a: "The measure of the Tribes' reserved water right is the water necessary to irrigate the practicably irrigable acreage on the reservation. In [*Arizona I*], a needs test was rejected as too uncertain, the Court opting instead for practicably irrigable acreage as the measure of a tribal agricultural reserved water right. Two subsequent non-Indian reserved water right cases [*Cappaert, New Mexico*] indicate that necessity is the measure of a reserved water right. And in [*Fishing Vessel*], the Court recognized the propriety of reducing the Indians' proportion of the fish harvest as their needs diminished. Nonetheless, the Court declined the invitation to re-examine the PIA standard in [*Arizona II*] and reaffirmed the value of the certainty inherent in the practicably irrigable acreage standard. The district court was correct in quantifying the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage."

There can be no doubt that the general quantification standard is uncertain in the minds of the lower courts.

In the absence of clarification and resolution by this Court, the confusion already apparent in the lower courts will inevitably expand. The question of the proper standard of quantification for Indian reserved water rights has already caused much confusion and much hope for clarification among the commentators. Some writers strongly support the general application of the PIA standard.[22] Still others have blamed the lack of quantification of many tribal water rights upon the unsettled state of the law by which quantification will be governed.[23] Regardless of the assistance the commentators may attempt to provide on the issue, probably the most apparent result of their many inquiries is to document the confusion regarding what standard governs the quantification of tribal reserved water rights.[24]

The quantification standard for this important federal water right should be clear and uniform throughout the western states. This Court should either affirm the practicably irrigable acreage standard or clarify appli-

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[22] Collins, *Indian Allotment Water Rights*, 20 Land and Water Law Review 421, 427-428 (1985). Others have criticized PIA and called for reliance upon other standards. Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 Columbia L. Rev. 1299, 1311-1314 (1974).

[23] Florio, *Water Rights: Enforcing the Federal Indian Trust After Nevada v. United States*, 13 Am. Indian L. Rev. 79, 80 (1985).

[24] *See*, for example, Collins, *The Future Course of the Winters Doctrine*, 56 Colo. L. Rev. 481, 484 (1985); *Brookshire, et al., Economics and the Determination of Indian Reserved Water Rights*, 23 Nat. Res. J. 749, 763-764 (1983); Comment, *Indian Reserved Water Rights: The Winters of Our Discontent*, 88 Yale L. J. 1689, 1694-1699 (1979); Comment, *Federal Reserved Rights in Water: The Problem of Quantification*, 9 Texas Tech. L. Rev. 89, 99-101 (1977); Comment, *Application of the Winters Doctrine: Quantification of the Madison Formation*, 21 S.D. L. Rev. 144, 150-155 (1976); Note, *The Irrigable Acres Doctrine*, 15 Nat. Res. J. 375, 379-384 (1975).

cation of the rapidly evolving necessity standard for use in quantifying the reserved water right of agricultural Indian reservations.

B. *The Wyoming Supreme Court's award of a reserved water right in an amount far in excess of that historically used after full irrigation development is in conflict with decisions of the Ninth Circuit federal court of appeals.*

The reserved water right awarded by the Wyoming Supreme Court was quantified for practicably irrigable acreage far in excess of the land historically irrigated on the Reservation after over eighty years of intensive water development. As a result, the decision of the Wyoming Supreme Court is in conflict with the decisions of the Ninth Circuit federal court of appeals in *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939), hereinafter *Walker River*, and *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied, Ahtanum Irrigation District v. United States*, 352 U.S. 988 (1957), hereinafter, *Ahtanum*.

The Wind River Reservation in Wyoming enjoys a history of extensive irrigation development pursuant to state awarded water rights, unlike the reservations in *Arizona I, supra*.[25] Between 1905 and 1915 some 145,000 acres of land of the Wind River Reservation were awarded state water rights for the benefit of the Indians. This amount of irrigated land soon proved to be far more than was needed. By 1963, state water rights for 40% of that land had been voluntarily cancelled, leaving 87,000 acres under state water rights. Based on the practicably irrigable acreage standard, however, the Res-

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[25] Master's Report, *Arizona v. California*, December 5, 1960, p. 256. In contrast to the Wind River Reservation, the five reservations in *Arizona I* were not set aside and developed for a particular tribe but, instead, were established for the future use of unknown tribes. *Id.*, p. 262. In fact, irrigation was "not practiced" on the Chemehuevi Reservation, *id.*, p. 86, and was "negligible" on the Fort Mohave Reservation. *Id.*, p. 85.

ervation's reserved water rights were quantified based on 103,000 acres of irrigable acreage, of which only 54,200 acres had been historically irrigated. In other words, after the infusion of massive amounts of congressionally mandated expenditures for the construction of irrigation projects under Wyoming law, the historic practicably irrigable land base of the reservation was 54,200 acres, requiring some 290,500 acre feet of water annually.[26] Nevertheless, under the Wyoming Supreme Court's decision below, the reserved water right awarded was 500,400 acre feet[27] or 72% greater than historical needs. This windfall was awarded in the absence of any evidence showing that the additional water was essential to meet the minimum needs of the Reservation or to accomplish its agricultural purpose.

The Ninth Circuit has twice addressed the quantification standard for the reserved water right for an agricultural Indian reservation on which there has been a history of irrigation development. On the Walker River Indian Reservation in Nevada, there had been no showing of "the *necessity* or demand for the cultivation of a larger area than 2,100 acres," for which 26.25 second feet of water was found to be sufficient. *Walker River*

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[26] Historic practicably irrigable acres and the reserved water right based thereon were: 37,284 acres and 16,932 acres for which 207,641 acre feet and 82,849 acre feet were awarded, Appendix D, at pp. 172a, 182a, for a total of 54,221 acres of historic land for which 290,490 acre feet were awarded a Federal reserved water right.

[27] Future practicably irrigable acreage and the reserved water right based thereon awarded by the district court were: 48,097 acres and 423 acres for which 186,990 acre feet and 1,947 acre feet were awarded, Appendix D, at pp. 172a, 182a, for a total of 48,520 acres of future land for which 188,937 acre feet were awarded as a reserved water right by the district court. The Wyoming Supreme Court reversed a 10% reduction of the future award by the district court. Appendix A, at pp. 56-58, thereby increasing the district court's award by 20,993 to 209,930 acre feet. The total award by the Wyoming Supreme Court, for both historic and future acreage, was 500,420 a.f.

supra, 104 F.2d at 340. The Ninth Circuit consequently limited the reserved water right to that precise amount "as a fair measure of the needs of the government as demonstrated by seventy years' experience." *Id.*, at pp. 339-40.[28] On the Yakima Indian Reservation in the State of Washington, the United States entered into an agreement with neighboring non-Indian irrigators in 1908 which limited the Indians' use of water from Ahtanum Creek. The Ninth Circuit in *Ahtanum*, *supra*, 236 F. 2d at 337, felt constrained to uphold the validity of the agreement but, nevertheless, described the Indians reserved water right as being in that amount required to provide for the Indian's reasonable needs, as measured upon the completion of the Reservation's water project.[29]

These two Ninth Circuit opinions are in direct conflict with that of the Wyoming Supreme Court, below, which granted a reserved water right 72% greater than the water needed by the Tribes after eighty years of

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[28] The Ninth Circuit stated: "We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians. There remains for decision the question as to the quantity to which the United State is entitled. The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it. The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary could only be demonstrated by experience. . . . We are constrained to accept this estimate [26.25 c.f.s.] as a fair measure of the needs of the Government as demonstrated by seventy years' experience. . . . So precious is every miner's inch of water in these parched regions that no arrangement should be countenanced which would encourage waste or tend to induce it." *Walker River*, *supra*, 104 F.2d at 339-40.

[29] The Ninth Circuit stated: ". . . the implied reservation of the waters of this stream extended to so much thereof as was required to provide for the reasonable needs of the Indians, not merely as those needs existed in 1908, but *as they would be measured in 1915, when the Indian ditch system has been completed.*" (emphasis added) *Ahtanum*, *supra*, 236 F.2d at 337.

extensive irrigation development and the apparent conclusion of irrigation development. Creation of such an excess simply means that reserved right water will be placed to secondary uses, rather than the Reservation's primary purpose, in violation of the Court's admonition in *New Mexico*, *supra*, 438 U.S. at 700.[30] Consequently this Court should determine the question of whether the reserved water right, for an agricultural Indian reservation with a long-established history of irrigation, may exceed the Reservation's historical needs.

III. PRIORITY DATE OF THE RESERVED WATER RIGHT—The Wyoming Supreme Court's award of an original priority date, for land ceded from the reservation and later restored or reacquired, is in conflict with the decisions of this Court and those of the Ninth Circuit.

The judgment of the Wyoming Supreme Court, below, is in direct conflict with the recent decisions of this Court establishing the circumstances under which Indian reservations are disestablished, the termination of Indian rights in the ceded lands upon disestablishment, and

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[30] For example, as claimed, the reserved water right included instream flows of up to 6,000 c.f.s. for fisheries, wildlife and aesthetic purposes, an amount which would completely curtail all upstream diversions. This claim was denied and the United States and Tribes sought to amend the judgment in that regard. Although the proposed amendment was rejected, the district court held that once the reserved water right is quantified for irrigation, it arguably may be used for virtually any purpose on the Reservation so long as the consumptive use is not increased. Amended Judgment and Decree, May 24, 1985, Appendix D, at p. 183a. *See also* Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983, Appendix E, at p. 194a. While the prohibition on any increased consumptive use may appear to be ample protection, it is important to remember that new uses may be non-consumptive, yet quite injurious to other users. For example, if the Tribes convert their reserved water right into the very fisheries flows for which a reserved water right was rejected, those fisheries flows would have the effect of eliminating diversions by other water users above and within the Reservation. Appendix F, at pp. 259-60a.

reserved water right priority dates for lands added to a reservation. *Rosebud, supra; Oregon v. Klamath*, 473 U.S. 753 (1985), hereinafter *Klamath*, conflict in principle only; and *Arizona II, supra.* In addition, the Wyoming Supreme Court's decision is in conflict with the decisions of the Ninth Circuit court of appeals regarding the priority date of a reserved water right associated with former reservation lands which are restored to the reservation, *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), hereinafter *Anderson*, or which are reacquired by or on behalf of Indians. *Colville v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), hereinafter *Walton II.*

A. *The grant of an original priority date for public lands which were later restored to the reservation is in conflict with the principles announced by and the decisions of this Court in Rosebud, Klamath and Arizona II.*

The Wyoming Supreme Court affirmed an 1868 reserved water right quantified for 40,300 practicably irrigable acres which were ceded by the Wind River Reservation Tribes in 1905 and restored ("added to and made a part of" the Reservation) from 1940 to 1974 by the United States to satisfy the Tribes' needs for additional "grazing land." *See* note 2, *supra.* The Wyoming Supreme Court did not discuss the basis for its decision and the district court simply concurred "with the conclusion of the special master that this land was held in trust for the Tribes by the United States and never lost its Indian status." Appendix F, p. 225a. The master's conclusion was based on *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), hereinafter *Ash Sheep*, involving the Crow Reservation in Montana, as well as the Water Proviso in Article III and preservation of other benefits in Article X of the 1905 Act. Appendix X, at pp. 778-79a, 774a. In brief, the master concluded that the Indian's retention of an interest in the proceeds of the sale or the lease of ceded lands precluded a disestablishment of those lands under *Ash Sheep*

as did the omission of the word "convey" under *Rosebud* and the protection of all other rights under Article X of the 1905 Act.

On all counts, the reasoning below was in conflict with the principles announced by this and other courts. Reliance on *Ash Sheep* is misplaced in that the relevant portion of the Crow Reservation involved in that case was later held to be disestablished in *Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1981). Reliance on the omission of the word "convey" in the 1905 Act overlooks the use of "conveyed" in Article II of the Act and violates the principles of *Rosebud*, *supra*, in which this Court held that the Rosebud Sioux Reservation had been partially disestablished under circumstances virtually identical to those surrounding the Wind River Reservation in 1905. Reliance on the savings provision in Article X of the 1905 Act is in direct conflict with the decision in *Klamath*, *supra*, in which an identical provision was held to reserve no implied rights to the Tribes in the ceded lands. Finally, the award of an original priority date based on land subsequently "added to" the Reservation is in direct conflict with the holding in *Arizona II*, *supra*, 460 U.S. at 641.

Acting in defiance of the principles and decisions announced by this Court, the Wyoming court found that the reserved water right for the ceded lands survived their cession in 1905 and were entitled to an original priority date of 1868, rather than a priority as of the date those lands were "added to and made a part of" the Reservation.

B. *The grant of an original priority date for public lands which had been conveyed to non-Indians, then later reacquired by the Indians is in conflict with the decision of the Ninth Circuit in Anderson.*

The Wyoming Supreme Court awarded an 1868 reserved water right based on practicably irrigable lands which had been ceded to the United States, conveyed to non-Indians under the public land laws, and then

reacquired by or on behalf of Indians. Such an award is in direct conflict with the Ninth Circuit's decision in *Anderson, supra*, 736 F.2d at 1361-62. In that case, the Ninth Circuit held that water rights appurtenant to reacquired homesteaded lands carry a priority determined by state law and that the reserved water right for homesteaded lands without a perfected state water right bear a priority as of the date of reacquisition.

C. *The grant of an original priority date for lands which were allotted to individual Indians, conveyed to non-Indian grantees, and reacquired by or on behalf of the Indians, is in conflict with the decisions of the Ninth Circuit in Anderson and Walton II.*

In *Walton II, supra*, 647 F.2d 42, at 51, the Ninth Circuit held that a non-Indian owner of an original Indian allotment does obtain a reserved water right, although it may be lost by the non-Indian's non-use. In *Anderson, supra*, 736 F.2d at 1361-62, the Ninth Circuit held that, upon reacquisition of the allotment, the Tribes obtain a reserved right with an original priority date only if the non-Indian grantor has not lost the right through non-use. The Wyoming decision, below, however, granted an 1868 priority date and required no showing that the reserved right continued to be used by the intervening non-Indian owner(s). Appendix A, p. 72-75a.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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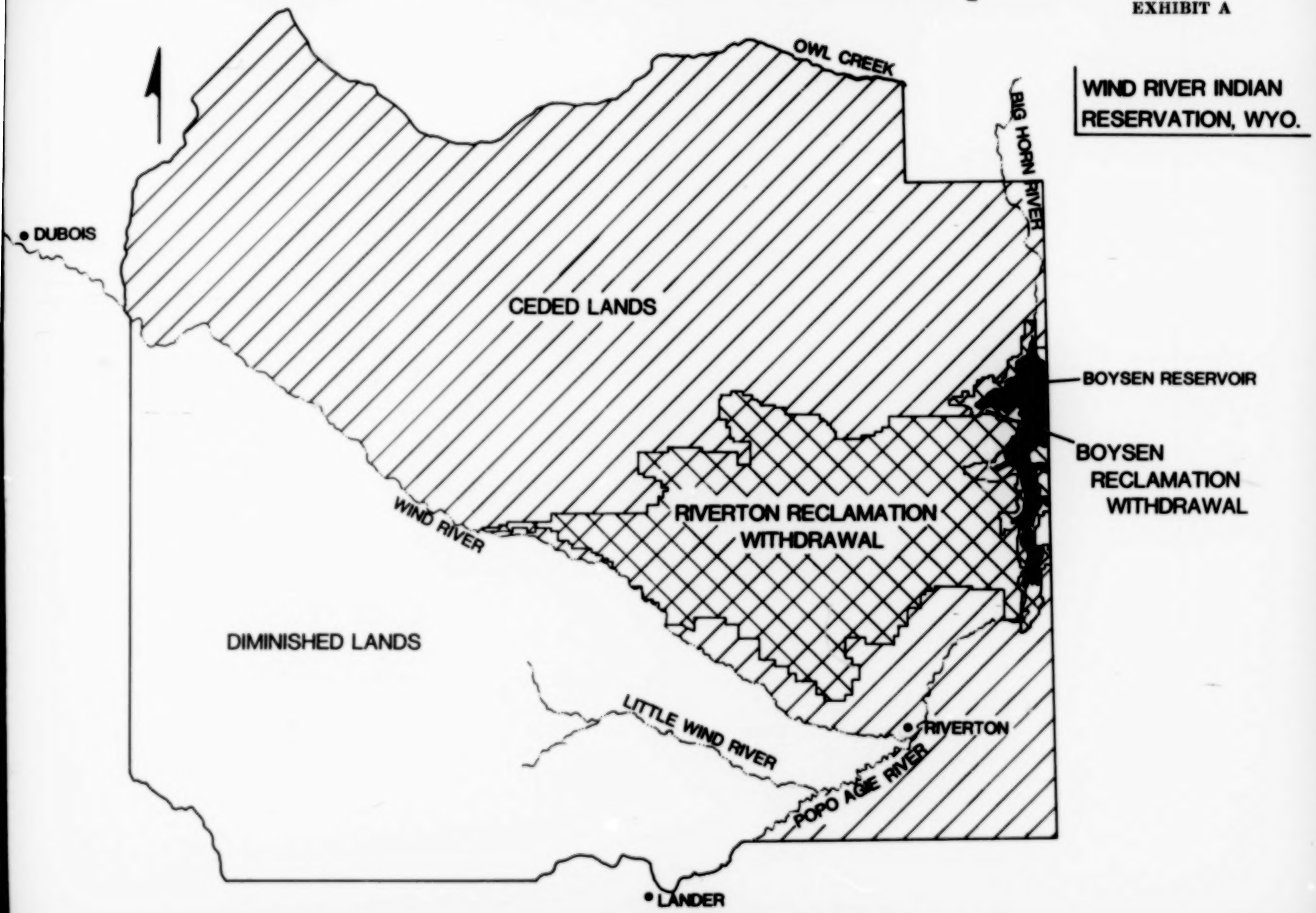
EXHIBIT A


WIND RIVER INDIAN RESERVATION, WYO.
OWL CREEK
BIG HORN RIVER
DUBOIS
CEDED LANDS
BOYSEN RESERVOIR
BOYSEN RECLAMATION WITHDRAWAL
RIVERTON RECLAMATION WITHDRAWAL
WIND RIVER
DIMINISHED LANDS
LITTLE WIND RIVER
RIVERTON
POPO AGIE RIVER
LANDER